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6 UNITED STATES DISTRICT COURT FOR THE
7 WESTERN DISTRICT OF PENNSYLVANIA
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9 THOMAS BEALE,

10 *Plaintiff,*

11 v.

12 MAXINE OVERTONE, *et al.*,

13 *Defendants.*
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) CA. NO. 13-15 Erie
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16 **ORDER ADOPTING REPORT AND RECOMMENDATION**

17 The Court, having reviewed Defendants' Motion for Summary Judgment [Dkt. No. 122],
18 Plaintiff's Opposition thereto [Dkt. No. 141], the Report and Recommendation of the Honorable
19 Susan P. Baxter, United States Magistrate Judge [Dkt. No. 157], Plaintiff's Objections thereto
20 [Dkt. No. 158], the relevant legal authorities, and the balance of the record, HEREBY finds and
21 rules as follows:

- 22 (1) Plaintiff Thomas Beale is an inmate in the custody of the Pennsylvania Department
23 of Corrections ("DOC") and currently resides at State Correctional Institution at
24 Albion ("SCI-Albion").
25 (2) Following the Pennsylvania General Assembly's passage of the Clean Indoor Air

1 Act in 2008, the DOC banned all indoor smoking at any DOC facility, including
2 SCI-Albion. Nevertheless, the parties agree that indoor smoking is common at SCI-
3 Albion.

4 (3) Throughout his time at SCI-Albion, Plaintiff has repeatedly complained about the
5 presence of environmental tobacco smoke (“ETS”) at the facility. Plaintiff, who is
6 allergic to cigarette smoke, has complained of shortness of breath, wheezing,
7 coughing, and other asthmatic symptoms. He has also experienced occasional
8 incidents of syncope, during which he loses consciousness. Plaintiff submitted
9 several formal grievances through the prison grievance system concerning his
10 allegations of excessive ETS exposure and the lack of the enforcement of the
11 prison’s anti-smoking policy.
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13 (4) Plaintiff alleges that shortly after he filed the grievances, a number of incidents
14 occurred that he contends were done in retaliation for his filing the grievances.
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16 (5) Plaintiff initiated this action pursuant to 42 U.S.C. § 1983 against a number of DOC
17 officials and officers, asserting an Eighth Amendment claim based on Plaintiff’s
18 “involuntary exposure to [ETS], inadequate prison conditions, inadequate medical
19 treatment, official oppression, failure to supervise and failure to train” and a First
20 Amendment retaliation claim based on Defendants allegedly “withholding
21 outgoing mail, sexual assault, falsely judging in sanction of an Informal Resolution
22 Process, damage to private property, confiscation of legal material, failing to
23 supervise and failure to train.” Dkt. No. 64 at ¶¶ 1, 284-291.
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25 (6) Defendants moved to dismiss Plaintiff’s lawsuit, alleging among other arguments,
that he failed to adequately allege certain Defendants’ personal involvement in the

1 alleged violations, failed to state a claim for deliberate indifference on the part of
2 Defendants in non-medical positions with the DOC, failed to state a claim for First
3 Amendment retaliation, and failed to state a claim against Defendants in their
4 official capacity. Dkt. Nos. 68.

5 (7) Defendants' motion to dismiss was granted in part and denied in part. Dkt. No. 84.

6 As such, the following claims remain: (1) an Eighth Amendment claim based on
7 exposure to ETS with respect to Defendants Michael Harlow (Superintendent of
8 SCI-Albion from 2010 to 2013), Harold Hodge (Corrections Officer serving as a
9 Housing Sergeant at SCI-Albion), F.L. Jones (Corrections Officer), Gary Ferraro
10 (Corrections Officer serving as a Housing Officer), William Maloney (Corrections
11 Officer serving as a Housing Sergeant), and Michelle Wagner (Plaintiff's Unit
12 Manager) and (2) a First Amendment retaliation claim against Wagner, Boyd
13 Sullivan (Corrections Officer), Tracy Lindsey (Corrections Officer), Steven
14 Williamson (Corrections Officer), and Alexander Pierce (Corrections Officer).
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16 (8) On September 2, 2016, the remaining Defendants moved for summary judgment
17 on Plaintiff's remaining claims. Dkt. No. 122. Magistrate Judge Baxter issued the
18 instant Report and Recommendation on July 28, 2017. Dkt. No. 157. The Report
19 and Recommendation recommends that this Court: (1) deny Defendants' motion
20 for summary judgment as to Plaintiff's Eighth Amendment claim against
21 Defendants Harlow, Hodge, Jones, Ferraro, Maloney, and Wagner, (2) deny
22 Defendants' motion as to Plaintiff's First Amendment Retaliation claim against
23 Wagner, and (3) grant the motion as to Plaintiff's First Amendment Retaliation
24 claim against Defendants Sullivan, Lindsey, Williamson, and Pierce. Dkt. No. 157
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at 23.

(9) Plaintiff timely objected to the portion of the Report and Recommendation recommending that this Court grant Defendants' summary judgment motion on Plaintiff's First Amendment retaliation claim against Defendants Sullivan, Lindsey, Williamson, and Pierce. Dkt. No. 158. Defendants did not respond to Plaintiff's Objections.

(10) Plaintiff bases his First Amendment retaliation claims against Defendants Sullivan, Lindsey, Williamson, and Pierce on two searches of his cell that occurred on December 23, 2011 (Sullivan and Lindsey) and February 17, 2012 (Williamson and Pierce), as well as a written misconduct report issued to Plaintiff by Defendant Lindsey as a result of the December 23, 2011 search. Plaintiff argues that these searches were done in retaliation for his filing formal grievances regarding his exposure to ETS. Magistrate Judge Baxter recommends that these claims be dismissed because Plaintiff cited to no evidence that would allow a reasonable jury to conclude that Defendants Sullivan, Lindsey, Williamson, and Pierce were aware of Plaintiff's protected activity (*i.e.*, filing grievances) before they took their adverse action (*i.e.*, searching his cell). Plaintiff counters that there is sufficient evidence in the record for a jury to reasonably draw a causal connection between Plaintiff's protected activities and Defendants' actions.

(11) It is not necessary for this Court to reach a conclusion regarding the sufficiency of Plaintiff's evidence on his First Amendment retaliation claim against Defendants Sullivan, Lindsey, Williamson, and Pierce, because, even if these Defendants were aware of Plaintiff's protected activities and searched his cell in retaliation for the

1 protected activities, the searches are not a sufficient adverse action to establish a
2 First Amendment retaliation claim. Third Circuit precedent is clear: “the search of
3 a cell is not a sufficient adverse action for purposes of a [First Amendment]
4 retaliation claim, irrelevant of whether it is” done in response to a plaintiff’s
5 constitutionally protected conduct. *Banks v. Rozum*, 2015 WL 1186224, *7 (W.D.
6 Pa. March 13, 2015); *aff’d*, 639 Fed. Appx. 778, 781-83 (3d Cir. 2016); *Curtician*
7 *v. Kessler*, 2010 WL 6557099, *7 (W.D. Pa. 2010) (noting that “courts have
8 consistently held that a cell search is not an ‘adverse action’ for retaliation
9 purposes”); *see also*, *Lashley v. Wakefield*, 367 F. Supp. 2d 461, 470 (W.D.N.Y.
10 2005) (dismissing First Amendment retaliation claim based on cell searches
11 because “inmates have no constitutional protection from cell searches, even those
12 conducted for retaliatory purposes”); *Jones v. Harris*, 665 F. Supp. 2d 384, 398
13 (S.D.N.Y. 2009) (“[N]either the United States Supreme Court nor the Second
14 Circuit has ever held that a cell search can be the basis of a First Amendment
15 retaliation claim.”).

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18 (12) Likewise, the written misconduct report issued by Defendant Lindsey cannot be the
19 basis for a First Amendment retaliation claim against Defendant Lindsey. The
20 written report states that Plaintiff “had a pair of broken Koss headphones that where
21 [sic] altered and also did not belong to him” which constituted a Class I Charge
22 (Possession of contraband, destroying, altering, tampering with or damaging
23 property). Dkt. No. 125-2, Ex. 11. “[F]iling a false misconduct report is cognizable
24 as a denial of due process when the false misconduct charge is filed for the ‘sole
25 purpose of retaliating against an inmate for his/her exercise of a constitutional right

1 such as his or her right to file a grievance[.]’” *Lewis v. Wetzel*, 153 F. Supp. 3d 678,
2 702-703 (M.D. Pa. 2015) (quoting *Smith v. Mensinger*, 293 F.3d 641, 653-654 (3d
3 Cir. 2002)). However, here, Plaintiff admits that he had possession of the broken
4 headphones. Dkt. No. 142 at ¶ 507. Therefore, the misconduct report cannot be the
5 basis for a First Amendment retaliation claim against Defendant Lindsey.

6 (13) Thus, this Court hereby ADOPTS the Report and Recommendation of Magistrate
7 Judge Baxter in full. Defendants’ motion for summary judgment is granted in part
8 and denied in part, as follows:

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10 (a) Defendants’ motion for summary judgment on Plaintiff’s Eighth
11 Amendment claim based on exposure to ETS is DENIED with respect
12 to Defendants Harlow, Hodge, Jones, Ferraro, Maloney, and Wagner;

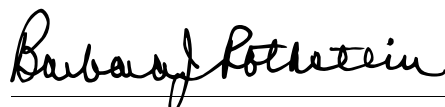
13 (b) Defendants’ motion for summary judgment on Plaintiff’s First
14 Amendment retaliation claim is DENIED with respect to Defendant
15 Wagner; and

16 (c) Defendants’ motion for summary judgment on Plaintiff’s First
17 Amendment retaliation claim is GRANTED with respect to Defendants
18 Sullivan, Lindsey, Williamson, and Pierce.

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20 (14) The Clerk of the Court is respectfully directed to send copies of this Order to
21 Plaintiff, Defendants, and to Judge Baxter.

22 **IT IS SO ORDERED.**

23 DATED this 27th day of September, 2017.

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Barbara Jacobs Rothstein
U.S. District Court Judge

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